

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition for
Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition for
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

**ADMINISTRATIVE LAW JUDGE'S RULING
ADOPTING PROTECTIVE ORDER FOR
THE NINE-MONTH FCC TRIENNIAL
REVIEW PROCEEDING**

By this ruling, a Protective Order is adopted governing the treatment and protection of confidential information produced for use in this proceeding (FCC Triennial Review-Nine Month Phase). This ruling resolves disputes among the parties concerning the terms and conditions to be incorporated into the Protective Order. At the September 30, 2003 prehearing conference (PHC), parties were directed to meet and confer to resolve differences over language in the draft Protective Order that had been initially submitted by Worldcom, Inc. (MCI).

After discussions to reach agreement, parties submitted on October 10, 2003 to the assigned administrative law judge (ALJ) three alternative versions of the Protective Order: one version sponsored by the incumbent local exchange carriers (ILECs), a second sponsored by the competitive local exchange

carriers (CLECs) and a third, sponsored by the Office of Ratepayer Advocates (ORA). The alternative versions reflected common agreement on certain revised language, but also reflected disputes remaining with respect to other terms.

A telephonic conference was held on October 14, 2003 where parties made oral arguments before ALJ Pulsifer in support of their respective versions. The revisions in language to which all participants have agreed are adopted in the final version. The adopted Protective Order incorporates the proposed language of the CLECs with respect to procedures for additional signatures on an Exhibit B and C form (in Confidential Information Section C) and with respect to the specific limits on access and “small company” restrictions (in Confidential Information Section D). The adopted Protective Order incorporates the proposed language of the ILECs with respect to use of confidential material in other proceedings or jurisdictions, with certain modifications. The modifications incorporate specific deadlines for action and also expressly place the burden of proof on the producing party with respect to dispute resolution to justify why the confidential information should not be allowed to be used in other proceedings or jurisdictions. The added language shown on page 7 of the ILEC’s proposed draft shall be modified as follows:

“If the producing party still objects to giving such written authorization after the meet and confer session, the reviewing party may request an order from the ALJ or the Commission allowing the use of Confidential Information in other proceedings or jurisdictions where similar confidentially protections are in place. The producing party shall be given the opportunity to respond to the request for access before any order is granted by the ALJ or Commission. The burden of proof shall be on the producing party, for good cause shown, to justify why the request allowing the use of Confidential Information in other proceedings or jurisdictions should not be granted.”

The remaining text additions on page 7 of the draft proposed by the ILECs that begins: “Except as expressly provided in this Protective Order....” is incorporated in the adopted Protective Order without change.

The adopted Protective Order also incorporates the language revisions proposed by ORA.

IT IS RULED that the Protective Order attached to this ruling is hereby adopted for use in this proceeding as outlined above.

Dated October 16, 2003, at San Francisco, California.

/s/ Thomas R. Pulsifer

Thomas R. Pulsifer
Administrative Law Judge

ATTACHMENT

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PROTECTIVE ORDER

In the phase of the above-styled proceeding ("this Proceeding") dealing with the nine-month FCC Triennial review, it is anticipated that the parties may designate certain documents and information to be confidential and exempt from public disclosure. Therefore, a Protective Order covering such documents and information is hereby issued to facilitate timely submission of information in this proceeding and in any discovery conducted in this Proceeding. This Protective Order shall control the production of information and documents in this Proceeding.

Definitions

1. The term "party" as used in this Protective Order means any party to this Proceeding, including any parent, subsidiary, affiliate or agent.
2. The term "Confidential Information" refers to all documents, data, information, studies, cost study information, models, diagrams, flowcharts, and

other materials, and includes but is not limited to oral or other tangible or intangible form such as ideas, concepts, and know-how, designated as confidential by a producing party and furnished pursuant to requests for information or admissions, depositions, or otherwise during this Proceeding. Such information shall include but not be limited to information claimed to be trade secrets, confidential business information, and information subject to an evidentiary privilege or exempt from public disclosure under relevant California statutes, including the California Public Records Act (Cal. Gov. Code § 6250 *et seq*). The parties will work cooperatively to determine if certain limited, summary information from cost studies that would otherwise fit the definition of “Confidential Information” may be designated as not “Confidential Information” for use at the Hearing. “Confidential Information” shall not include information contained in the public files of any federal or state agency that is subject to disclosure under relevant California statutes, including the California Public Records Act (Cal. Gov. Code § 6250 *et seq*) nor shall it include information that, at the time it is provided through discovery or otherwise during this Proceeding or prior thereto, is or was public or that becomes public other than through disclosure in violation of this Order. “Confidential Information” shall not include information found by the ALJ, the Commission or a court of competent jurisdiction not to merit the protection afforded Confidential Information under the terms of this Order.

Confidential Information

(a) General. During this Proceeding or other proceedings to be conducted in connection with or arising from this Proceeding, a party may designate certain material produced by such party, including written documents or copies, computer disks, CD-ROMs or other recordable media, as Confidential

Information. The party designating material as Confidential Information shall clearly identify at the time of production, each portion of the material alleged to be Confidential Information. Counsel for the producing party shall review the information sufficiently to state in good faith that the information merits the Confidential Information designation. Each party will perform an additional level of review to ensure that the information determined to be confidential is reasonably classified as Confidential Information. There is a rebuttable presumption that all information is non-confidential, and the burden of establishing confidentiality will be on the party proposing confidential treatment. In the event that any party believes an item has been inadvertently classified as Confidential Information, then the party shall bring the matter to the producing party's attention prior to taking any action at either the Commission or elsewhere.

(b) Material received by the Commission. Material received by the Commission in accordance with this procedure shall be subject to nondisclosure protections pursuant to Cal Pub. Util. Code § 583 and General Order (G.O.) 66-C.

(c) Material Provided to Parties. Material claimed to be Confidential Information must be provided to the other parties to this Proceeding, provided that they agree to treat the material as Confidential Information, as evidenced by the employees and representatives of the receiving party who have access to the Confidential Information signing the attached Exhibit A. One copy of the material shall be provided to each party, the receipt of which will be evidenced by counsel or other authorized representative signing the attached Exhibit B and returning it to the producing party upon receipt of the Confidential Information. The receiving party shall be entitled to make limited copies of the Confidential Information, provided that each person receiving a copy of the Confidential

Information shall sign the attached Exhibit C, and that a tracking report is developed by the receiving party, accounting for the additional number of copies and the individuals in possession of such copies. The Confidential Information may be transmitted through the Internet, an Intranet, or via a facsimile transmission, U.S. mail, or overnight delivery service, provided that it shall be the responsibility of the party transmitting documents to ensure that the documents are only received by individuals authorized to receive the information. Additionally, the individuals receiving the Confidential Information via electronic means, facsimile, U.S. mail or overnight delivery, must sign an Exhibit C, in addition to an Exhibit A, and such individuals shall be included on the tracking report referenced above. The receiving party and any individuals in possession of Confidential Information shall keep the Confidential Information properly secured during all times when the documents are not being reviewed by a person authorized to do so.

(d) Review by Parties. Each receiving party may designate specific individuals associated with the party who will be allowed access to the Confidential Information. The individuals who may have access to the Confidential Information shall be limited to the receiving party's counsel of record, regulatory personnel or witness(es) acting at the direction of counsel, and independent consultants employed by the receiving party and who are under the direction of receiving party's counsel, provided that such regulatory personnel, witness(es) and independent consultants are not involved in developing, planning, marketing, or selling services or other offerings such as unbundled network elements ("UNEs"), strategic or business planning; competitive assessment; OSS planning or procurement; and/or network planning or procurement on behalf of the receiving party, unless the producing party gives prior written authorization

which shall not be unreasonably withheld or delayed, for specific individuals in the prohibited categories above, to review the Confidential Information. If the producing party refuses to give such written authorization in a timely manner, the receiving party may, for good cause shown, request an order from the ALJ or the Commission allowing an individual involved in the prohibited categories above to have access to the Confidential Information. The producing party shall be given the opportunity to respond to the request for access before any order granting such access is issued by the ALJ.

Parties with fewer than 3,000 employees, including the employees of affiliates within a common holding company, qualify as a "Small Company." For a Small Company, the individuals who may have access to the Confidential Information shall be limited to the receiving party's counsel of record, personnel or witness(es) acting at the direction of counsel (or, if the party is not represented by counsel, under the direction of a member of senior management), subject matter experts and independent consultants, employed by the receiving party and who are under the direction of the receiving party's counsel or senior management, provided that such personnel, witness(es), and independent consultants are not primarily involved in developing, planning, marketing, or selling services; strategic or business planning; competitive assessment; for the Small Company, unless the producing party gives prior written authorization for specific individuals in the prohibited categories above to review the Confidential Information. If the producing party refuses to give such written authorization, the receiving party may, for good cause shown, request an order from the ALJ or the Commission allowing individuals involved in the prohibited categories above to have access to the Confidential Information. The producing party shall

be given the opportunity to respond to the request for access before any order granting such access is issued by the ALJ or the Commission.

Before providing access to Confidential Information to any person authorized under this Order to receive Confidential Information, counsel for the receiving party shall deliver a copy of this Order to such person, and prior to disclosure such person shall sign Exhibit A, attached hereto, providing such person's full name, permanent address, employer, title, and the party with whom the signatory is associated. Every signed Exhibit A shall be delivered to the producing party's counsel at least 24 hours, excluding weekends and holidays, prior to such person gaining access to the Confidential Information. By signing such statements, a party may not be deemed to have acquiesced in the designation of the material as Confidential Information or to have waived any rights to contest such designation or to seek further disclosure of the Confidential Information.

Counsel of record for the persons authorized hereunder who requested the copies shall sign a statement in the form of Exhibit B, attached hereto, verifying that the sealed envelope clearly marked as containing Confidential Information has been received, and designating the name and address of the individual into whose custody the copies shall be delivered. Access to said copies shall be limited to those persons specified in this Order. Additionally, for every copy of the information that is made, counsel for the party seeking to review the Confidential Information shall deliver an Exhibit C, attached hereto, identifying what information has been copied and delivered to each person who is authorized to review said Confidential Information.

Certain highly sensitive Confidential Information may, in good faith, be designated as "HIGHLY SENSITIVE CONFIDENTIAL INFORMATION." With

the exception of parties that qualify as a Small Company, such HIGHLY SENSITIVE CONFIDENTIAL INFORMATION shall be made available only to the receiving party's counsel, as well as to the receiving party's witness(es) and independent consultant(s) in this Proceeding who have a need to know and who are not involved in developing, planning, marketing, or selling services or other offerings such as unbundled network elements ("UNEs"), strategic or business planning; competitive assessment; OSS planning or procurement; and/or network planning or procurement on behalf of the receiving party. For a Small Company, as defined above, the individuals who may have access to the HIGHLY SENSITIVE CONFIDENTIAL INFORMATION shall be limited to the receiving party's counsel, as well as to the receiving party's witnesses, and subject matter experts and independent consultants, who have a need to know and who are not primarily involved in developing, planning, marketing, or selling services; strategic or business planning; competitive assessment; OSS planning or procurement and/or network planning or procurement for the Small Company, unless the producing party gives prior written authorization for specific individuals in the prohibited categories above to review the HIGHLY SENSITIVE CONFIDENTIAL INFORMATION. Access by such counsel, the receiving party's witnesses and independent consultant(s) to HIGHLY SENSITIVE CONFIDENTIAL INFORMATION shall be given only after each such witness or independent consultant has signed Exhibit A, attached hereto. If the receiving party wishes to make access to HIGHLY SENSITIVE CONFIDENTIAL INFORMATION available to its witnesses or independent consultants who are or are anticipated will in the future be involved in the prohibited categories above, counsel for receiving party shall obtain the producing party's prior written authorization, which shall not be unreasonably

withheld or delayed, and also submit counsel's sworn statement for each such witness or independent consultant, addressing in detail the measures that have been and will be taken to ensure that such witness or independent consultant cannot and does not use or disclose HIGHLY SENSITIVE CONFIDENTIAL INFORMATION in the course of performing duties in the prohibited categories above. If the parties cannot agree on such access within a reasonable time, the parties may seek rapid resolution from the ALJ or the Commission. The producing party shall be given the opportunity to respond to the request for access before any order granting such access is issued by the ALJ or the Commission.

These heightened restrictions on HIGHLY SENSITIVE CONFIDENTIAL INFORMATION shall not apply to the Utility Reform Network ("TURN") with respect to such information, TURN shall instead apply the restrictions set forth in this Protective Order for Confidential Information.

A third party claim of confidentiality shall not obviate or modify a producing party's obligation to supply Confidential Information pursuant to the terms of this Protective Order. The parties shall work together in good faith to obtain and/or produce information claimed to be confidential by a third party vendor or other claimant.

Notice of Public Record Act Requests

If the ALJ, Commission or Commission staff receive a California Public Records Act request for disclosure of information claimed to be Confidential Information produced pursuant to this Protective Order, then the requesting party shall, as promptly as is reasonably feasible (but in no event later than two (2) business days after filing the request) notify the party whose information is

sought that a request for disclosure of the information has been made pursuant to the California Public Records Act.

Storage at the Commission

Confidential Information, if submitted to the Commission, shall clearly be labeled as Confidential and filed under seal in accordance with the requirements of Cal. Pub. Util. Code § 583 and G.O. 66-C.

Good Faith Use of Material

To the extent that such efforts will not damage a party's presentation of its position in this Proceeding, each party shall use its best efforts to phrase deposition and other discovery questions, prefiled testimony, questions asked on live examination of a witness, briefs, other pleadings and oral argument in a way which will eliminate or minimize the need for documents in the record to be under seal. Any party intending to refer to Confidential Information during a hearing, other than for purposes of cross-examination or impeachment during a hearing, shall, as soon as possible, provide advance notice of this to the parties, and the ALJ, identifying with particularity the Confidential Information in question. The party asserting confidentiality bears the burden of proving that the alleged Confidential Information should be admitted under seal.

If it becomes necessary, or at the request of a party, the ALJ may order additional guidelines addressing the procedures and standards for admissibility of alleged Confidential Information.

All persons who may be entitled to receive, or who are afforded access to, any Confidential Information by reason of this Protective Order shall neither use nor disclose the Confidential Information for any purpose other than preparation for and conduct of this FCC Triennial Review Proceeding. If any person receiving Confidential Information under this Protective Order wishes to use

such Confidential Information in any other proceeding, whether conducted by this Commission, any other state public utilities commission, the FCC or otherwise, then the receiving party shall provide notice within two business days to the producing party in the other proceeding and shall meet and confer within five business days with the producing party in this Proceeding, reasonably explain the purpose of the requested disclosure, and obtain the producing party's prior written authorization, which shall not be unreasonably withheld or delayed. The parties anticipate that use of such Confidential Information in other proceedings may be reasonable if, for example, (a) the other proceeding directly relates to the 2003 FCC Triennial Review Order, (b) the Confidential Information is directly relevant to the factual inquiries at issue in the other proceeding (*e.g.*, common OSS functions, switches in adjacent states bearing on impairment determinations in the subject state) and, (c) the other state public utility commission(s) or the FCC has in effect a protective order, or has approved a nondisclosure agreement, that provides substantially similar protections for the Confidential Information as provided by this Protective Order. If the producing party still objects to giving such written authorization after the meet and confer session, the reviewing party may request an order from the ALJ of the Commission allowing the use of Confidential Information in other proceedings or jurisdictions where similar confidentiality protections are in place. The producing party shall be given the opportunity to respond to the request for access before any order is granted by the ALJ or Commission. The burden of proof shall be on the producing party, for good cause shown, to justify why the request allowing for the use of Confidential Information in other proceedings or jurisdictions should not be granted.

Except as expressly provided for in this Protective Order, any other use or disclosure of any Confidential Information in any other proceeding, whether conducted by this Commission, any other state commission, the FCC, or otherwise, is prohibited. Nor shall the producing party's, the ALJ's, or the Commission's grant of authorization to the receiving party to use the Confidential Information in another proceeding constitute a waiver of any right of any party to the other proceeding to object to the discoverability or admissibility of the Confidential Information in the other proceeding.

All such persons shall use their best efforts to keep the Confidential Information secure in accordance with the purposes and intent of this Protective Order. To this end, persons having custody of any Confidential Information shall keep the documents properly secured during all times when the documents are not being reviewed by a person authorized to do so.

Upon the completion of Commission proceedings and any appeals thereof, Confidential Information received by the parties and all copies thereof, except for materials made a part of the record in this Proceeding, or relied upon in the Commission's orders in this Proceeding, shall be returned to the producing party or destroyed, at the option of the producing party, absent a contrary order of the Commission or agreement of the parties. Material filed with the Commission will remain under seal at the Commission. The Commission may destroy Confidential Information in accordance with its records retention standards.

Other Rights Preserved

This Protective Order shall in no way constitute any waiver of the rights of any party to contest any assertion of confidentiality, to appeal any finding that specific information is Confidential Information or should be subject to the protective requirement of this Order, or to seek further disclosure of Confidential

Information. The designation of any information as Confidential Information may be challenged to the ALJ, the Commission, or any agency or court having jurisdiction, for a determination, after hearing, as to whether said material should be so classified. Nothing in this Protective Order shall be deemed to prevent the Commission from raising on its own motion the correctness of designating information as Confidential Information. Nothing in this Protective Order, or any order of the Commission adopting this Protective Order, shall be construed as an order by the ALJ or the Commission that the materials exchanged under this Protective Order are in fact entitled to confidential treatment. Nothing in this Protective Order shall be construed as requiring any party to produce any information that would otherwise be exempt from discovery as a matter of law (*e.g.*, attorney-client privilege or attorney work-product materials), nor as altering any procedures otherwise established under state law for asserting any objections to discovery based on a claim of privilege or exemption.

The parties affected by the terms of this Protective Order further retain the right to question, challenge and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of the Protective Order in response to requests for information or other modes of discovery, and the right to cross-examine on any applicable grounds.

This Protective Order may be superseded by an order of the ALJ, the Commission, or a court of competent jurisdiction after due notice and an opportunity for comment by affected parties. Titles or subtitles in this Order are informational only and are not intended to affect the textual provisions.

ISSUED ON THIS THE _____ DAY OF _____ 2003.

R.95-04-043, I.95-04-044 TRP/avs

EXHIBIT A
TO
PROTECTIVE ORDER

I agree to comply with and be bound by the terms and conditions of this Protective Order.

SIGNATURE: _____

NAME PRINTED: _____

TITLE: _____

ADDRESS: _____

REPRESENTING: _____

EMPLOYER: _____

DATE: _____

EXHIBIT B
TO
PROTECTIVE ORDER

STATEMENT OF RECEIPT

I, _____, acknowledge receipt of
the original copy of the Confidential Information and agree to maintain in
accordance with the terms of this Protective Order. These copies are to remain in
the possession of:

Name: _____

Title: _____

Address: _____

Signed on this _____ day of _____ 2003.

Name (Printed)

EXHIBIT C
TO
PROTECTIVE ORDER

The documents listed below have been copied pursuant to the terms of the
Protective Order applicable to this Proceeding.

These copies will remain in the custody of:

Name: _____

Title: _____

Address: _____

Signed on this ____ day of _____ 2003

Name (Printed):

ATTACHMENT 1
TO
PROTECTIVE ORDER

Copies of the following documents have been provided to Counsel of
Record, pursuant to the terms of the Protective Order applicable to this
Proceeding.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Adopting Protective Order for the Nine-Month FCC Triennial Review Proceeding on all parties of record in this proceeding or their attorneys of record.

Dated October 16, 2003, at San Francisco, California.

/s/ Antonina V. Swansen
Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, *e.g.*, sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.